



In the
Supreme Court of the United States

OCTOBER TERM, A. D. 1944

FRANK L. NATHANSON,
Petitioner,
vs.

STATE OF ILLINOIS,
Respondent.

**BRIEF IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI**

I.

The opinions of the court below.

The opinion of the court below will be found in 389 Ill. 311. The case was taken by writ of error to the Supreme Court of Illinois and transferred by that court (382 Ill. 145) to the Appellate Court. The judgment was affirmed by the Appellate Court (321 Ill. App. 158). The judgment of the intermediate court was affirmed in 389 Ill. 311. By taking the case originally to the Supreme Court of Illinois, your petitioner did not waive his constitutional rights. We complain here of the final judgment of the highest court of the State.

II.

Jurisdiction.

The judgment was entered in the trial court (the Criminal Court of Cook County, Illinois), but a *superseas* was allowed by the Supreme Court of Illinois, and as appears from the record herein, that Court affirmed the judgment on January 17, 1945. Under the rules that judgment was not made final until a petition for rehearing was denied on March 15, 1945. The Supreme Court of Illinois has the record, a certified transcript of which is filed herewith.

The claim that due process of law as guaranteed by the fourteenth amendment was presented to the trial court (Abst. 74), and the adverse decision there was assigned as error in the Supreme Court (Abst. 77).

Our respectful claim is that the highest court of our State has refused to pass upon the federal questions as such, which questions were properly raised, and which were questions of substance not heretofore determined by this Honorable Court. As your Honors know, the use of certiorari to correct error is not infrequent in criminal cases.

So, in the case at bar, there can be no question but what there has been:

- (1) A final judgment or decree;
- (2) The decision sought to be reviewed is by the highest court of the state in which decision could be had;
- (3) The judgment or decree was rendered in a "suit" involving a "case" or "controversy";
- (4) The case presents substantial federal questions;
- (5) The federal questions sought to be reviewed

were properly raised and preserved in the state courts; and

- (6) The decision of the highest court of the state does not rest upon a state ground which independently and adequately supports the judgment or decree.

So, as your Honors will perceive, the questions in the case at bar narrow themselves down to whether or not substantial federal questions are submitted, which questions, of course, are for decision upon the entire record in the light of the decisions of this Honorable Court and in the exercise of discretion and the supervisory power of this Honorable Court.

III.

Statement of the case.

We refer your Honors to our Petition for a statement of the case.

IV.

Specification of Errors.

1. The Supreme Court of Illinois erred in holding that the indictment was sufficient.

2. The Supreme Court of Illinois erred in affirming the judgment in the absence of proof of the *corpus delicti*.

3. The court erred in overruling the defendant's motion to quash the indictment.

4. The court erred in admitting improper evidence on behalf of the People and in not striking same and in not instructing the jury to disregard same improper evidence.

5. The court unduly limited and restricted counsel for the defendant in the examination of witnesses.

6. A fatal variance exists between the evidence and the charge.

7. The evidence is insufficient to support the verdict.

8. The court erred in refusing to direct a verdict when requested at the close of the evidence.

9. The conduct, remarks, questions asked and arguments made by the prosecutors were of such prejudicial character as to deprive the defendant of a fair trial.

10. The court erred in ruling on objections made to the argument of the State's Attorney and in refusing to rule when requested.

11. The court erred in the giving of each of the instructions requested by the People.

12. The court erred in refusing proper instructions requested by the defendant.

13. Petitioner was deprived of due process of law as guaranteed by the fourteenth amendment.

BRIEF.

I.

In all criminal prosecutions the accused should have the right to demand the nature and cause of the accusation.

Section 9, Article 2, Constitution of Illinois.

A.

It is our claim here that due process includes an indictment which measures up to the ordinary standards.

II.

A conviction cannot be had upon a false allegation that particulars are unknown.

People v. Hunt, 251 Ill. 446.

15 C. J. S. sec. 84, p. 1116.

III.

The indictment is insufficient under the established law of Illinois.

Aldrich v. People, 225 Ill. 610.

Wilkinson v. People, 226 Ill. 135.

Maloney v. People, 229 Ill. 593.

A.

It is our claim here that the refusal of the State court to apply the established law denied petitioner the equal protection of the laws.

IV.

It is necessary to name the persons conspired against.

People v. Niederhauser, 258 Ill. App. 564, 569.

15 C. J. S., sec. 84, p. 1116.

Jones v. United States, 11 F. (2) 98.

United States v. Riley, 74 F. 210.

V.

The People failed in their attempt to prove the *corpus delicti* as it was necessary to prove the substantive offense in order to establish the conspiracy in the absence of direct proof.

People v. Peyser, 380 Ill. 404.

A.

More than one person must be guilty to sustain conviction for conspiracy.

People v. La Bow, 282 Ill. 227.

People v. Mader, 313 Ill. 277.

Mackreth v. United States, 103 F. (2) 495.

B.

The gist of the offense is the unlawful agreement.

People v. Tilton, 357 Ill. 47.

15 C. J. S. 1058, sec. 35.

C.

The general rule that circumstantial evidence, to support a conviction, must be such that the conclusion drawn therefrom excludes every reasonable hypothesis other than guilt applies to criminal conspiracy, and no conviction can be had when the evidence is as consistent with innocence as with guilt.

15 C. J. S., sec. 93, p. 1150.

Nestor Johnson Mfg. Co. v. Goldblatt, 265 Ill. App. 188.

Marzen v. People, 173 Ill. 43.

D.

One of the allegations of the indictment was that the abortions were not necessary for the preservation of life. The proof does not support this allegation.

People v. Davis, 362 Ill. 417, 423.

People v. Hagenow, 334 Ill. 341, 345.

Fulbright v. United States, 91 Fed. (2d) 210.

State v. Dunkelbarger, 206 Iowa 971; 221 N. W. 592.

State v. Smalley (Mo.), 252 S. W. 443.

State v. DeGroat, 259 Mo. 364; 168 S. W. 702, 708.

VI.

The proof must correspond to the allegations in the indictment.

Lowell v. People, 229 Ill. 227.

Parnell v. United States, 64 Fed. (2d) 324.

Macante v. United States, 49 Fed. (2d) 156.

15 C. J. S., sec. 84, p. 1116.

15 C. J. S., sec. 90, p. 1136.

People v. Walsh, 322 Ill. 195, 207.

VII.

The errors committed deprived the defendant of due process of law as guaranteed by the constitution and laws of the State of Illinois and the fourteenth amendment to the constitution of the United States.

Palko v. Connecticut, 302 U. S. 319, 327.

Powell v. Alabama, 287 U. S. 45.

Mooney v. Holohan, 294 U. S. 103.

Moore v. Dempsey, 261 U. S. 86.

Snyder v. Massachusetts, 291 U. S. 97, 105.

Brown v. Mississippi, 297 U. S. 278, 285.

Herbert v. Louisiana, 272 U. S. 312, 316.

ARGUMENT.

MAY IT PLEASE THE COURT:

The defendant did not take the stand nor did he produce any witnesses. He relied first upon the trial court and then upon the Supreme Court to afford him due process of law. Now he must appeal to your Honors for the protection afforded by the fourteenth amendment. This is not the ordinary case as we have pointed out in our petition. If we were unable to offer any explanation or excuse for the illegal conduct of the prosecutor, we hope that the errors are so flagrant that your Honors could see that there is something wrong. As Mr. Justice Cardozo pointed out in *Palko v. Connecticut*, 302 U. S. 319, 327, in speaking of *Powell v. Alabama*, 287 U. S. 45:

“The decision turned upon the fact that in the particular situation laid before us in the evidence the benefit of counsel was essential to the substance of a hearing.”

We carry the reasoning of this court a step further and maintain that the particular right denied by the State does not have to be “benefit of counsel”, nor need the “particular situation” always include a race question as in *Moore v. Dempsey*, 261 U. S. 86. In *Mooney v. Holohan*, 294 U. S. 103, perjured testimony was said to have been used in a murder case arising out of a labor dispute.

As Mr. Justice Cardozo has pointed out in the *Palko* case, it is not every right guaranteed by the constitution under the federal system which must be enforced by the States. Some provisions thought to be safeguards can

be abolished by the States without a violation of the fundamental principles of justice as Mr. Justice Cardozo said (325):

“The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other.”

Suppose in the case at bar the prosecutor drew an indictment which said, “You are guilty of something or other which will be developed at the trial.” Then at the trial it was claimed that he had violated the law by committing suicide. We contend that the indictment and the proof in the record is just as preposterous. The principles of justice which have been denied here are “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Snyder v. Massachusetts*, 291 U. S. 97, 105; *Brown v. Mississippi*, 297 U. S. 278, 285; *Herbert v. Louisiana*, 272 U. S. 312, 316.

The Constitution of Illinois, Sec. 9 of Art. 2, provides that “in all criminal prosecutions the accused should have the right to demand the nature and cause of the accusation” against him (*Cochran v. People*, 175 Ill. 28, 34). And as was held in *People v. Hunt*, 251 Ill. 446, a conviction can not be had upon false allegations that particulars are unknown. We quote (450):

“The relaxation of the rule in this regard results from necessity, and cannot be invoked where the particulars omitted from the indictment were within the knowledge of the grand jury or might have been ascertained by the exercise of ordinary diligence. In Bishop’s Criminal Procedure (vol. I, sec. 549), it is said: ‘If the grand jurors refuse to learn the name when they might, their ignorance of it thus willfully produced, proceeding from no necessity, creates none; and if they lay it as unknown, proof of the facts at the trial will show the allegation to be unauthorized and there can be no valid conviction thereon.’

"Where matters which ought to be stated in the indictment are omitted and the excuse is stated that such facts were unknown to the grand jurors, the truthfulness of the excuse given is put in issue by the plea of not guilty and the burden is upon the State to prove such allegation."

The Sixth Amendment to the United States Constitution¹ makes a similar provision and your petitioner was guaranteed this right by the Fourteenth Amendment.²

In the case at bar we did not content ourselves with a mere demand that the State be required to prove that the facts were unknown to the grand jury. We moved to quash, we asked for a bill of particulars, and at the trial we proved that the allegation was false. We proved that all of the women involved were known to the grand jury; they appeared before the grand jury and testified at the trial (Abst. 53).

We do not request your Honors to again examine any question of fact upon which the jury had any evidence, nor do we ask that errors in the admission of evidence be examined here. We must, however, dwell briefly upon such matters in order to make clear our federal questions.

In the absence of any direct proof of a conspiracy, we submit that any claim of proof by circumstances must fail. If Dr. Nathanson had been charged with the sub-

¹In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

²"... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

stantive offense it might be that, within reasonable limits, former similar offenses might have been shown as tending to show intent, but as was said in *People v. Rongetti*, 338 Ill. 56, 58:

“Evidence of other similar offenses, to be competent as proof of guilty knowledge, must show that such alleged similar offenses were, in fact, criminal offenses.”

In the case at bar each treatment given, if any, might have been no criminal offense as far as the evidence discloses. Your Honors might search this record in vain for evidence of the discharge of any foetus or of a miscarriage. There is no proper and legal evidence of the pregnancy of any woman. Even if proof of other offenses might be proper, the proof of their commission must be strict (*People v. Perlmutter*, 306 Ill. 495, 500; *People v. Ernst*, 306 Ill. 452).

The indictment alleges that the conspiracy was formed upon December 3, 1941 (Abst. 3). The Ceropski woman visited the doctor on November 24, 1941. If the date in the indictment be regarded as one which can be shifted and we are to look to the evidence, and it is pretended that November 24, 1941, was the date the conspiracy was formed, then the other instances are subsequent and could furnish no light upon the intent existing on November 24th (*People v. Hobbs*, 297 Ill. 399). It will be noticed that the Minch case (Abst. 26) and the Walke case (Abst. 45) occurred *after* the Diamond case (Abst. 36). The Diamond and Walke cases were stricken, and we submit that the Minch and Ceropski cases should have also been stricken.

The Supreme Court of Illinois reversed a conviction in *People v. Peyser*, 380 Ill. 404, from which we quote:

“It was essential in this case to establish the

corpus delicti, which would include proof that Anna Feret was pregnant at the time the abortion was performed (*People v. Wyherk*, 347 Ill. 28). We do not believe the fact prosecutrix stated that she believed she was pregnant, unaccompanied by any corroboration, is proof beyond a reasonable doubt of pregnancy."

In the case at bar there is no mention of sexual intercourse. It is only to be inferred that the women thought themselves pregnant. It is common knowledge that mistakes are easily made in the formation of any such opinion, and that treatment by a doctor is called for in cases mistaken by the woman for pregnancy.

In the case at bar there is not the slightest attempt to prove that any abortion was committed with a criminal intent.

Your Honors will notice that the medical testimony introduced by the State is meaningless if the insinuations of the prosecutor by way of questions be eliminated. Dr. Kroll testified (Abst. 45) that the first time he saw Mrs. Ceropski was on December 1, 1941, at his office, where he made an examination. He found that the uterus had been enlarged and was very tender. The cervix was soft and her abdominal wall was rigid and she had a temperature of 104. He testified further (Abst. 47) that he sent her to the hospital and again made the same type of examination and found a well localized mass in the left lower portion of the abdomen. Dr. Kroll does not say that he found any lacerations or bleeding or anything that would indicate a prior use of instruments. We contend that lawyers and judges have sufficient knowledge, and possibly it is common knowledge, that the conditions found and described by Dr. Kroll are just as consistent with innocence as with any possible guilt upon the part

of Dr. Nathanson. One is left to guess as to whether or not the woman had been pregnant or was pregnant at the time Dr. Kroll examined her; whether there had been any interruption to her pregnancy, and if so, whether such interruption was necessary to save her life. It is submitted that the testimony of Dr. Kroll suggests the existence of a tumor or some other female disorder.

The indictment was shown at the trial to have been false in alleging that the conspiracy was participated in by unknown persons. All of the women were handled by the four people named in the indictment, and by no one else. The receptionist, Gladys McCall, was directed out of the case (Abst. 57). We contend that if the nurse and the interne had been on trial a like result would have been required by the evidence. It is obvious that these persons could not be said to be in any conspiracy without proof of guilty knowledge. So it follows that if any one had any guilty knowledge, which must include a knowledge that the operation was not necessary to preserve life, that person was Dr. Nathanson alone. Of course, he could not conspire by himself and the charge must fail. *People v. LaBow*, 282 Ill. 227; *People v. Mader*, 313 Ill. 277, and *Mackreth v. United States*, 103 F. (2d) 495.

In the *Peyser* case the State Court discussed the possibility of sufficient proof of an attempt to commit the crime upon a woman not pregnant. No such possibility exists in the case at bar. The indictment alleges that the women were pregnant and that the operation was not necessary to save life. It would be ridiculous to picture four or more people conspiring to attempt. In the absence of proof of an agreement the State might have proved the existence of the illegal agreement by proving participation with guilty knowledge in the substantive offense. But

when they have no proof of any substantive offense and no proof of any agreement, the proof as to any conspiracy failed. We submit that the trial judge should have directed a verdict for the doctor when so requested (Abst. 3, 54) (*People v. Wyherk*, 347 Ill. 28).

We also contend that under the allegation that the conspiracy was directed at women unknown, the State produced what little proof they had of women known to the grand jury and that therefore a fatal variance exists between the charge and the proof.

In *Lowell v. The People*, 229 Ill. 227, it was held that if an indictment for conspiracy to cheat and defraud names the person intended to be cheated and defrauded the proof must correspond with the allegation, and it is not sufficient to prove a conspiracy to defraud the public generally, or any person whom the defendants might meet. We submit that the converse should be true. This indictment is a mere catch all, intended by the prosecution to evade the constitutional rights of the defendant.

Now after the evidence is in and in view of our claim that there was no conspiracy we submit that if the Court had ordered a bill of particulars the prosecutor would have been unable to draw a proper one. He would have been compelled to admit that he intended to prosecute upon general principles and to create a suspicion that there was something wrong about the practice of the doctor.

As was said in *Cochran v. The People*, 175 Ill. 28, 34, in *West v. People*, 137 Ill. 189, will be found a citation of authorities to the effect that the constitutional provision, section 9 of article 2, providing that in all criminal prosecutions the accused shall have the right "to demand the nature and cause of the accusation" against him, is for the purpose of securing to him such specific

designation of the offense laid to his charge as will enable him to prepare fully for his defense, and plead the judgment in bar of a subsequent prosecution for the same offense.

In the *Cochran* case it was held that a jury might conjecture or imagine from the allegations the nature of the offense with which the defendant is charged, but it could not be said that it so plainly alleged that it could be easily understood either by him or the jury. We submit that such an observation can be made of the indictment in the case at bar. The law of conspiracy has often been abused by prosecutors as we all know and we submit that the case at bar illustrates further that claim. The law will not tolerate the piecing together of a great many weak cases to make one good case.

As was held in *People v. Richie*, 317 Ill. 551, the highest degree of certainty is required in an indictment, as the offense must be stated with such certainty that a conviction or acquittal may be pleaded in bar of a subsequent prosecution for the same offense.

In the case at bar we submit that the acts shown can not be properly designated as overt acts as there was no conspiracy shown. We submit there should be some limitation upon proof of overt acts. It was held in *McDonald v. The People*, 126 Ill. 150, where the issue is whether a party is guilty of a general conspiracy, distinct overt acts of conspiracy may be given in evidence; and when the issue is whether a party is guilty of a specific overt act of conspiracy, it is competent to give in evidence other overt acts of conspiracy which included, or are dependent upon, or constitute a part of the *res gestae*, but is it not admissible to give in evidence a specific overt act wholly disconnected from and independent of the acts charged, having no other relevancy to each other than that they are overt acts of the same parties.

We contend that there was no conspiracy. There was no question but what the doctor, his receptionist, his nurse and his interne concurred and aided each other in a plan to operate. In the absence of any evidence to the contrary, it must be presumed that the receptionist, the nurse and the interne had no knowledge which would make their assistance illegal, or the guilty participation in any conspiracy.

We submit that after the witness Diamond (Abst. 36) failed to contribute any evidence of value and the State *nolled* the second count of the indictment, that the court erred in not striking this testimony when requested (Abst. 57). *Baker v. The People*, 105 Ill. 452, 453.

We have referred to Illinois authorities. Your Honors will recognize fundamental principles which are universal in this country. The error of the State court in refusing to recognize these fundamental principles resulted in the denial of the equal protection of the laws and in the refusal of due process.

No Proof of Corpus Delicti

Defendant could not conspire alone. The indictment (Abst. 2), charges that the parties to the conspiracy, beside the defendant, were Gladys McCall, Nancy Rosenbush, John Doe and unknown persons. The evidence eliminates any persons unknown. Gladys McCall was the receptionist, Nancy Rosenbush the nurse and John Doe the anesthetist. No effort was made, as far as the evidence discloses, to arrest the last two named defendants. Gladys McCall was tried with this defendant and found not guilty at the direction of the court (Abst. 57). We submit that a like result would have been necessary if Nancy Rosenbush and John Doe had been on trial. We

contend that even if the defendant were shown to be guilty of the substantive offenses, the guilt of no other person was shown, and as the defendant could not conspire with himself, it necessarily follows a verdict should have also been directed in his behalf. (*People v. La Bow*, 282 Ill. 227; *People v. Mader*, 313 Ill. 277.) Compare *Gebardi v. United States*, 287 U. S. 112, where it was held that a woman merely acquiescing in her transportation by a man, for immoral conduct between them, in violation of Sec. 2 of the Mann Act, does not thereby commit the crime of conspiring to commit the substantive offense of which by the transportation he alone becomes guilty.

We are aware of the law which provides that it is not essential that all conspirators named be proved guilty. (*People v. Walsh*, 322 Ill. 195.) If the evidence warrants, two or more may be convicted and the others found not guilty. The evidence may in some cases show a conspiracy between the defendant and one not indicted, or one unknown. (*People v. Link*, 365 Ill. 266.) But we have no such case here. Assuming, for the purpose of argument, that the evidence shows the defendant guilty of the substantive offenses of abortion, named in the indictment as the object of the conspiracy, there is no evidence of criminal intent against any one else, known or unknown, so it must follow under the law that the defendant can not, under the evidence in this case, be guilty of conspiracy.

A combination of persons to accomplish an unlawful purpose, or a lawful purpose unlawfully, is a conspiracy. (*People v. Bain*, 359 Ill. 455.) We might eliminate the lawful purpose by consulting the indictment (Abst. 2). The object of the conspiracy in the case at bar is alleged to be, to cause a large number of women to abort and miscarry, (being pregnant, and where the abortions were not necessary to save life).

The elements of a criminal conspiracy have been stated to be (15 C. J. S., p. 1058, sec. 35):

(1) An object to be accomplished (here the crime of abortion on a large number of women unknown); (2) A plan or scheme embodying means to accomplish that object; (3) An agreement or understanding between two or more, whereby they become definitely committed to co-operate for the accomplishment of the object, by any effectual means.

The unlawful combination is the essence of criminal conspiracy. (*People v. Tilton*, 357 Ill. 47.)

There is no direct evidence of a conspiracy in the case at bar. No one claimed knowledge of any agreement, and no admission or confession was made by any one claimed by the prosecutor to be a co-conspirator. So if the conspiracy was established at all, it was by circumstantial evidence. We contend that the circumstantial evidence was insufficient. We do not ask your Honors to weigh the evidence or to test the credibility of any one. There are no facts or circumstances in proof from which the conspiracy can be inferred.

The trial court, at the insistence of the State's Attorney, ruled that the state witnesses were not accomplices (Abst. 191). It is our contention in this court, that (beside the question of law involved), there was not sufficient evidence against any witness to make such witness an accomplice. The state witnesses could not be said to be parties to a giant conspiracy to abort a large number of women. So all of the witnesses might be eliminated here now, as possible conspirators.

We do not question the law which makes it possible to establish a conspiracy by circumstantial evidence. We request application here of the familiar rule that circum-

stantial evidence to support a conviction must be such that the conclusion drawn therefrom excludes every reasonable hypothesis other than guilt, and that no conviction can be had where the evidence is as consistent with innocence as with guilt. (15 C. J. S., p. 1150, sec. 93, citing among other cases, *Nestor Johnson Mfg. Co. v. Goldblatt*, 265 Ill. App. 188. Also see *Marzen v. People*, 173 Ill. 43.)

The circumstantial evidence is deficient in that the state failed to prove any conspiracy. It is true of course, that the defendant was assisted, by the other defendants, in his various examinations, treatments and operations. We contend that in order to establish a conspiracy by circumstantial evidence, it was necessary to show that the defendant violated the abortion statute, and that at least one other person beside the defendant knew that the assistance rendered, by him or her, was for that purpose. In order to demonstrate our point, we beg leave to illustrate fundamental principles by example.

Suppose, for example, that A and B are charged with conspiracy to rob. The evidence shows that A held the gun and B searched the pockets of the victim. The evidence shows a conspiracy.

Suppose that the conspiracy charged, is the robbery of a bank. A and B are arrested as they enter the bank. In the absence of any further circumstances, it could not be said that the entry was for the purpose of robbery. If before the arrest of A and B, B had carried on and held up the bank, A who entered the bank with B, would be a conspirator or not, depending upon circumstances showing the presence or absence of criminal intent on the part of A.

Now, suppose that the charge is that A and B conspired to obtain the money of the bank, by false pretenses.

The evidence shows that A is B's secretary, she has drawn the papers and accompanied B to the bank. The mere co-operation of A and B is not enough. B might be guilty of the substantive offense and A not guilty. There would be no conspiracy. Further, if B were not guilty of the substantive offense, there would be no proof of conspiracy.

Now, suppose the case at bar in two ways, First, A, B, C and D are shown to have participated in three operations. B is the doctor and knows that the operation in each case is on a woman found to be pregnant by him, and he knows in each instance that the operation is not necessary to save life. A, C and D are his assistants, there is no evidence as to what they might know or not know. A, C and D are not shown to be guilty, of any crime or criminal intent. B can not conspire with himself, so he is not guilty of conspiracy.

Second supposition: A, B, C and D are shown, as before to have participated in three operations. There is no evidence, as to guilty knowledge or intent, against A, B, C or D. Result, no conspiracy proved. This last example illustrates our contention, as to the case at bar.

We expect to demonstrate the proposition that when the state charges a conspiracy to violate a special statute, and undertakes to prove the conspiracy by circumstantial evidence, it is necessary to prove a violation of the statute, or an attempt near enough to completion, to show the specific illegal intent charged and made necessary by the statute.

The statute, which we guess the indictment charges to have been violated, as the object of the conspiracy, is as follows (Ch. 38, sec. 3, Illinois Revised Statutes):

"Whoever, by means of any instrument, medicine,

drug or other means whatever, causes any woman, pregnant with child, to abort or miscarry, or attempts to procure, or produce an abortion or miscarriage, unless the same were done as necessary for the preservation of the mother's life, shall be imprisoned in the penitentiary not less than one year nor more than ten years; or if the death of the mother results therefrom, the person procuring or causing the abortion or miscarriage shall be guilty of murder."

The indictment in the case at bar alleges that the means were unknown. We submit that if the exact means were, in fact, unknown to the grand jury, a good indictment required that the grand jury first find that the means were such as prohibited by the statute, before finding that they were unknown. We shall postpone consideration of the indictment as a pleading, and devote our argument here to the evidence. There is a total failure of competent proof on an essential element, *i. e.*, that the abortions performed, if any, were not shown to be not necessary to save life.

We quote from *People v. Davis*, 362 Ill. 417, 423:

"Proof of the use of an instrument, medicine, drug or other means for the purpose of producing an abortion will not necessarily establish criminal intent. The statute defining murder by abortion specifically excepts from the penalties which it prescribes any person who produces an abortion for the necessary purpose of saving the life of the mother. An indictment charging abortion must negative every exception specified by the statute. (*Beasley v. People*, 89 Ill. 571.) Since it is essential to negative the fact that the abortion was caused or performed for the purpose of saving the mother's life, competent proof to negative that fact is necessary. The criminal intent necessary to be established to convict an accused charged with committing an abortion, is the intent to commit a criminal abortion, that is, an abortion for a purpose other than to preserve the life of the mother. *People v. Hobbs*, 297 Ill. 399."

We quote also from *People v. Hagenow*, 334 Ill. 341, 345:

"One of the allegations of the indictment was that the abortion was not necessary for the preservation of the life of the deceased. The proof does not support this allegation."

In the case at bar there is not a scintilla of evidence tending to prove that the abortions performed (if any), were not necessary to save life. In each instance the defendant made an examination, what he found and the conclusion he arrived at is not shown. He is presumed to be innocent, in the absence of any countervailing proof. Even if it be assumed, for the purpose of argument, that the defendant knew that the operations were not necessary, there is absolutely no evidence that any other person in the world had the same knowledge. Without that knowledge, as we have said, those assisting were innocent. If they were innocent, the defendant had no co-conspirators. There was no conspiracy.

Our point of law was applied in *Fulbright v. United States*, 91 Fed. (2d) 210, where the defendant was convicted of a conspiracy to violate a statute prohibiting the harboring of a person for whose arrest a federal warrant had been issued. Knowledge that the warrant had been issued was an essential element of the substantive crime, and it was held that this essential element must adhere in a charge of conspiracy to commit that crime.

Though a principal may commit a crime through the instrumentality of an unwitting agent, the state cannot, under an indictment charging that the defendant and another conspired to commit the crime, sustain a conviction merely upon proof that the other was an innocent agent acting under the direction of accused. (*State v. Smalley* (Mo.), 252 S. W. 443.)

In *State v. Dunkelbarger*, 206 Iowa 971, 221 N. W. 592, the defendant was convicted of attempting to produce a miscarriage under a statute similar to ours. The operation was performed by a physician who claimed that it was necessary to save the life of the patient. The defendant, a layman, assisted at the operation. It was held that if the doctor was not committing a crime, the defendant was not aiding one. In reversing the conviction for insufficiency of evidence, the Iowa Court said (594):

"It follows that if a regular physician does make an examination and does form an opinion, and does act upon it, he is entitled to the presumption of correct judgment and good faith until the contrary be proven. The burden was upon the state not only to prove that the operation was not necessary to save the patient, but that Dr. Wallace did not in good faith believe it was necessary."

"If the diagnosis of a regular physician discloses an internal condition of a patient which threatens his life, it may not be negated by the mere fact that the patient is unconscious of it and feels well and is apparently well. Fatal conditions are often found in patients who are wholly unsuspecting of their danger."

We submit that the circumstantial evidence in the case at bar is not sufficient. Your Honors are left to speculate as to whether the defendant had the criminal intent required by the statute, and your Honors will be unable to find any evidence of guilty knowledge as against the alleged co-conspirators. So it must follow that no conspiracy was established.

No Proof of Pregnancy.

The indictment charges that the object of the conspiracy was to cause a large number of pregnant women to abort. This we contend, was a necessary allegation, and required proper proof in order to establish the *corpus delicti*. The State's attorney recognized his duty to prove this allegation, but failed to produce the evidence required. We quote from the case of *People v. Peyser*, 380 Ill. 404, 408:

"We do not believe the fact prosecutrix stated that she believed she was pregnant, unaccompanied by any corroboration, is proof beyond a reasonable doubt of pregnancy."

Please see the record in the case at bar as to Bernice Ceropski (Abst. 15):

Your Honors will perceive that the opinion of this witness that she was pregnant was stricken. It is common knowledge that the failure to menstruate can be attributed to many causes other than pregnancy.

Upon re-direct examination (Abst. 42), the state proved, over objection, that Bernice Ceropski had missed her menstrual period and felt nauseated once. The witness Muriel Jensen Minch testified, over objection that she too had missed a menstrual period and suffered morning sickness (Abst. 34). The entire testimony of Dr. Kroll, who attended Mrs. Ceropski, was stricken (Abst. 49). Mrs. Ceropski told the defendant she was pregnant, but that, upon its face, could be nothing more than her personal opinion, held insufficient in the *Peyser case*. We have directed your Honors to all of the testimony in the record, on the subject of pregnancy. In the case at bar there is no proof of any foetus or any enlargement of the uterus. We quote again from the *Peyser case* (407):

"—and yet there is no testimony by her or anyone

else about the discharge of the foetus. The medical testimony offered on the part of the People does not show whether pregnancy ever existed."

So in the case at bar we do not even find the opinion of any one, qualified or not qualified, that any woman was pregnant. No one claimed that the doctor said anything to anybody indicating any opinion he might have formed.

We quote from *State v. De Groat*, 168 S. W. 702, 709, 259 Mo. 364:

"She was asked, is it true, whether defendant told her that an abortion was necessary to preserve her life, or the life of an unborn child, and she answered that the defendant had not told her any such thing. That does not help this case, unless we could judicially notice, as we cannot, that physicians always take their patients into full confidence and tell them why each medical or surgical step is taken. Upon the ground of the insufficiency of the evidence in the case to negative the non-necessity of the abortion, the demurrer to the evidence ought to have been sustained."

We have no quarrel with the rules from the *Ochs* (124 Ill. 423) and *Gallagher* (211 Ill. 158) cases cited by the Illinois Supreme Court. We agree that in such cases "The jury may imply the conspiracy of all from the overt acts of each."

There is nothing wrong with the rule of law, but it can not be applied in the case at bar, for the reason that the overt acts of each do not furnish sufficient facts from which to imply the conspiracy of all.

The Illinois Supreme Court has held that it is sufficient to establish the fact that a conspiracy existed to commit the crime of abortion whether such crime of abortion was committed or was possible to be committed. We have no quarrel with that as an abstract proposition, but we be-

lieve that we have demonstrated here that in the absence of direct evidence to establish the fact of the conspiracy, the state was compelled to prove the violation of the statute in order to prove that such violation was in fact, the object of the persons cooperating.

The indictment alleges that the conspiracy had as its object, the abortion of a large number of pregnant women. We believe that we have explained the application of the rule of the *Peyser case*, in the proof required of an essential circumstance. If the patients had been men, their visit would not have furnished a circumstance to prove the charge. If they were not pregnant they might as well have been men. At least it was necessary to prove, that the doctor thought they were pregnant. In the absence of proof as to what he thought, we can not assume that he thought non-pregnant women were in fact pregnant.

The Illinois Supreme Court has held that the facts before the jury, coupled with the facts disclosed by the other witnesses established an agreement existed between the defendant, the interne, nurse and others to commit abortions.

It is our contention that no such facts exist. It is not a matter of determining conflicts or weighing the evidence. Credibility of witnesses has nothing to do with our point. The State had no case and the Supreme Court of Illinois failed to perceive that fact. Of course, your Honors are not bound by statements to be found in the opinion of the State Supreme Court alone (*Truax v. Corrigan*, 257 U. S. 312, 328).

The Variance

The indictment alleges that the defendants conspired to abort a large number of women. The state produced four women, Luella Walke (Abst. 45), did not testify to more than the fact, that she visited the doctor, when she was withdrawn by the state, and her entire testimony was stricken (Abst. 52), on motion of the defendant.

Whatever operation was intended upon Muriel Minch (Abst. 26), was interrupted and not performed. Betty Diamond (Abst. 36), arranged for an examination and treatments, the nature of which have not been disclosed and your Honors have seen what Bernice Ceropski (Abst. 9) testified to. We took the precaution below, in order to preserve these defects, of showing that the trial court heard all that was disclosed to the grand jury (Abst. 53). So it appears that all the women the grand jury ever heard about in this case were four, pregnant or not pregnant, aborted or not aborted, necessarily or not. No one will say that four is a large number. No such conspiracy as that alleged, concerning a large number of women, was proved.

In *Parnell v. United States*, 64 Fed. 2nd 324, it was held that a county wide conspiracy to violate prohibition laws charged in the indictment must be proved as county wide. Proof of smaller conspiracies to operate particular stills was insufficient. The principle applied is the fundamental one, that the conspiracy charged must be proven. In *Macante v. United States*, 49 Fed. 2nd 156, 158, the court said that the testimony in large conspiracies is too apt to become but a confused jumble, and a verdict is apt to represent an impression that the defendants are guilty of something, with little reference to the crime with which they are charged.

We submit the point that it was improper to make a general false charge that the women were unknown to the grand jury. We quote from 15 C. J. S., sec. 84, p. 1116:

"An indictment or information for conspiracy should designate the persons conspired against by name, class, or other appropriate description.

Where the conspiracy is directed against a particular person, or the object of the conspiracy has been effected so that the person or persons intended can be ascertained, he or they should be designated by name, or the reason why such designation is not made should be stated; but where no intent as to any particular person was formed it should charge an intended wrong against some person, persons, or class of persons or the general public. In such cases it is, however, unnecessary to designate any particular individual."

In the case at bar no class or group of persons is described, nor is the general public involved.

We present our complaint here not merely as an objection to the indictment alone. We request a review of the entire case, including the evidence. With this in mind, we quote further from 15 C.J.S., sec. 90, p. 1136:

"The scope of a conspiracy should be gathered from the testimony and not from the averments of the indictment, although conspiracy is not an omnibus charge admitting proof of anything and everything, and the evidence admitted should correspond with the allegations made."

In *People v. Walsh*, 322 Ill. 195, 207, there was held to be a fatal variance between the indictment and the proof. The variance was as to the victim of the conspiracy. So, your honors will agree, the allegation as to the victim is a material one. The error was harmless in that case, for the reason other counts, to which there was no variance, supported the verdict. In the case at bar, there is

now only one count. The second count (Abst. 3), charged that the object of the conspiracy was to abort Betty Diamond. This count was dismissed when the defendants moved for an election (Abst. 55).

We quote from *People v. Niederhauser*, 258 Ill. App. 564, 569:

"Neither the first nor the second count of the indictment names the persons whom it is alleged plaintiff in error and the other defendants conspired to rob. Neither do they state that the names of such persons are to the grand jurors unknown. We therefore hold that each of said counts is fatally defective in this respect, and that the court erred in overruling the motion to quash said counts. *Lowell v. People*, 229 Ill. 227, 236; Wharton's Criminal Law, Vol. 2, sec. 1396."

Motion to Quash

Not every illegal act which is prohibited by the statute may be pleaded as the object of a conspiracy.

Your honors will dismiss any suggestion of a conspiracy at common law, because such a conspiracy requires the pleading of elements not mentioned or suggested in this indictment. In order to make destruction of an infant at common law a felony, there must have been a quickening (Wharton's Criminal Law, Twelfth Edition, Vol. 1, sec. 783, p. 1074). The indictment in the case at bar concludes (Abst. 2), contrary to the statute (*Scott v. People*, 141 Ill. 195). A defective statutory indictment cannot be sustained as common law indictment (*Long v. People*, 109 Ill. App. 197).

Now we refer your honors to *Maloney v. People*, 229 Ill. 593, holding a conspiracy indictment void for failure to plead facts in order to bring the charge within the conspiracy statute. Your honors will not find any

allegation in the case at bar, that any persons conspired intent "to obtain money or other property by false pretenses, or to do any illegal act injurious to the public trade, health, morals, police, or administration of public justice," so we submit that the indictment is not good under the above quoted portion of the statute. The next question that arises, does the indictment in the case at bar charge that the defendants conspired "to commit any felony"?

Permit us to quote from the indictment in order to again state the charge, as to the object of the conspiracy (Abst. 3):

"—with the malicious intent unlawfully, wilfully, knowingly, wrongfully and wickedly, by means which are unknown to said Grand Jurors, to cause in said County a large number of women to abort and miscarry when said women were respectively pregnant with child and when such respective abortions and miscarriages were not necessary for the preservation of the respective lives of said respective women; and the exact number of said women is unknown to said Grand Jurors; contrary to the Statute, and against the peace and dignity of the same People of the State of Illinois."

There is no such felony, as the causing of a large number of women to abort. No reference is made in the indictment to any particular statute, or any particular felony. We are left to guess that a violation of the abortion statute is intended by the pleader. An indictment cannot be aided by extraneous circumstances or explanation (*Aldrich v. People*, 225 Ill. 610).

As your honors, perceive, the intent alleged is "unlawfully, wilfully, knowingly, wrongfully and wickedly." Your honors will notice the absence of the word feloniously. Some of the other expressions are not applicable. It must be remembered that this indictment, as to its object, is not in the language of the conspiracy statute.

The object must be a felony. The pleader might have consulted the case of *People v. Warfield*, 261 Ill. 293, 297, for a form.

Your honors will notice that in the *Warfield case*, the pleader followed the language of the conspiracy statute, and made the direct charge that the defendants conspired to commit a felony. Then the pleader proceeded to name the facts, which constitute a good indictment for the felony named (including the name of the victim). An indictment for felony must charge felonious intent (*Ervington v. People*, 181 Ill. 408). We submit that the indictment, in the case at bar, is bad for uncertainty.

As your honors know, the highest degree of certainty is always required (*Wilkinson v. People*, 226 Ill. 135). The indictment in the case at bar, may apply equally well, to any number of women and give no notice of any particular charge and cannot be said to be sufficient under any construction of the criminal Code (*McNair v. People*, 89 Ill. 441).

The *Maloney case* is distinguished in *People v. Poindexter*, 243 Ill. 68, 71, but the *Poindexter case* is not important here for the reason that the felony there charged, as the object of the conspiracy, was confidence game. Our statute provides for a short form of indictment as to confidence game (*Graham v. People*, 181 Ill. 477), and the pleader in the *Poindexter case* included enough to comply with that statute. There is no such statute as to the form of the indictment in abortion cases, and such felony, we submit can not be described in the manner attempted. Your honors will perceive that we are discussing the object of the conspiracy in the case at bar, not the previous allegation as to the intention with which the confederation was formed.

As we have said, in the case at bar there is no allega-

tion that the object of the conspiracy was to do an illegal act injurious to the public health, etc. So the object must be intended to come under the first kind, *i. e.*, "A conspiracy to commit a felony of any kind." But, as we have said, your honors will not find any allegation in the case at bar, that the object of the conspiracy was *to commit a felony*. So it can not be said that the indictment in the case at bar is in the language of the statute.

The statement of a general rule is attempted in *People v. Lloyd*, 304 Ill. 23, 44:

"In an indictment for a conspiracy to commit a felony it is only necessary to designate the felony intended to be committed by such description as will apprise the defendants of the exact charge upon which they will be tried, and it is not required that the felony be described with the same accuracy as would be required in an indictment for the felony itself. (*People v. Warfield*, 261 Ill. 2934.)"

The point we make here was not good as against the indictment in the *Lloyd case*, because the statute and the elements of the offense named as the object of the conspiracy were clearly set out. (Your honors will also note, that the defendants had the benefit of a bill of particulars in the *Lloyd case*.) In the case at bar, it can not be said that the felony intended to be committed was designated by such description as to apprise the defendant of the exact charge upon which he was to be tried.

As was noted in the *Hunt case* (251 Ill. 446), it is necessary for the grand jury to describe certain things, and a conviction cannot be had upon a false allegation that a description is unknown.

Now after a study of the applicable rules, we request that your honors again examine the indictment as to the women. We again quote from the indictment (Abst. 3):

"—a large number of women to abort and miscarry

when said women were respectively pregnant with child and when such respective abortions and miscarriages were not necessary for the preservation of the respective lives of said respective women;"

The pleader did not even allege that the women were unknown, we have been giving the pleader a benefit to which he is not entitled. The pleader alleges that the exact number is unknown, but he does not say that some of them are not known. The evidence discloses that all of the women were known to the Grand Jury. We submit that in overruling our motion to quash (Abst. 4), the court had no right to speculate in favor of the State, but having overruled our motion the court was afterwards in possession of the knowledge afforded by the evidence, which included a disclosure of the fact that all of the women involved were known by name to the grand jury. Under such circumstances, the court should have granted a new trial (Abst. 73), or the motion in arrest of judgment (Abst. 75), which motion make the specific point here assigned as error (Abst. 76).

Conclusion

We submit that such questions presented are substantial and novel in this respect; our points are well established but the prosecution presents a new method devised to secure convictions. The grand jury heard the evidence and the prosecutor falsely claimed in the pleading prepared by him that the supposed victims were unknown. The statute is not aimed at all abortions and the prosecutor evidently has found the barriers erected for the protection of the doctor to be irksome. He finds difficulty in securing and sustaining convictions where he chooses to prosecute, so he has devised a new system as disclosed by this record. Here as your honors perceive the prosecutor has chosen to make a blanket charge in violation of all known rules of pleading and has supported that charge in defiance of the established rules of evidence. We submit that the prosecutor has substituted suspicion for proof and prejudice for reason. Your Honors are respectfully requested to reaffirm fundamental rights and to curb such illegal practice.

Respectfully submitted,

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Counsel for Petitioner.